

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1461

To be argued by
BARRY BASSIS

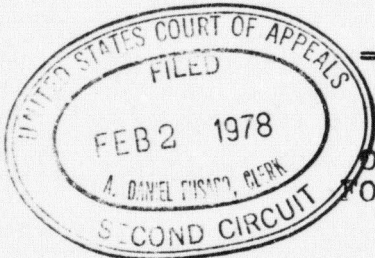
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
:
UNITED STATES OF AMERICA,
:
Plaintiff-Appellee,
:
-against-
:
ROLAND SMITH,
:
Defendant-Appellant.
:
-----X

B
p/s

Docket No. 77-1461

APPENDIX TO APPELLANT'S BRIEF



ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARTIN FRDMANN,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

BARRY BASSIS,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

0208 1 0843

SMITH, ROLAND

05 19

77

0280

03

04

U.S. TITLE SECTION

OFFENSES CHARGED

ORIGINAL COUNTS

18:371
18:2113(a) Consp. to commit bank robbery
18:2113(d) Bank Robbery
Armed Bank Robbery

1
2
3U.S. MAG
CASE NO.

77-418

BAIL • RELEASE

Denied ☐ AMT ☐ Fugitive
Set ☐ Pers. Recog
\$ 000 ☐ PSA
Date ☐ conditions
☐ 10% Deposit
☐ Surety Bond
☐ Collateral
☐ 3rd Ptry Cust
☐ One

II. KEY DATES & INTERVALS

SUPERSEDING
COUNTS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL	SENTENCE	
U.S. Custody Began * 4/7/77 Summons Served First Appearance	High Risk Date Indict. Waived In Charging District Information ☐ 5-19-77 Superseding ☐ Indict/Info ☐	5-23-77 1st Plea 5-23-77 Final Plea	Trial Set For 7-13-77 ☒ JNG ☐ G ☐ NOL {G. Plea W/Drawn ☐ JNG ☐ G ☐ NOL Trial Began 7-13-77 Trial Ended 7-19-77	Voir Dire ☐ Disposition of Charges 7-19-77 ☒ Convicted ☐ Acquitted ☐ Dismissed ☐ On Government's Motion	9-6-77 ☒ On All Charges ☐ On Lesser * Offense(s) ☐ WOP: ☐ WP

DATE	INITIAL/NO.	MAGISTRATE	OUTCOME:
4/4/77	HJR-08AD	INITIAL APPEARANCE DATE > 4/7/77	☐ DISMISSED
4/4/77	HJR-08AD	PRELIMINARY EXAMINATION OR REMOVAL HEARING Date > 4/15/77 MDJ-08AB Time > X NOT WAIVED Tape Number	☒ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT ☐ HELD FOR G. OR OTHER PROCEEDING IN DISTRICT BELOW

18 USC 2113(a) - BANK ROBBERY

U.S. Attorney

Robert N. Schwartz
791-1917 285

ATTORNEYS

Federal Defender Services Unit

McDUFFIE

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
4/4/77		Complaint filed, warrant issued	
4/7/77		Defendant presented, Legal Aid assigned. Defendant remanded into the custody of U.S. Marshal in lieu of \$35,000 cash/surety.	
4/15/77		Probable cause hearing held by Magistrate Harold J. Raby. Probable cause found, defendant held for the Grand Jury. Complaint ordered sealed.	
5-19-77		Complaint unsealed.	
5-23-77		INDICTMENT FILED, (S) 77 CR 280 & referred to Cannella, J.Stewart, J. DEFT (Atty present) Plea of Not Guilty. 10 days for motions Bail cont'd as to deft McDuffie. PT Services to look into Bail status as to deft Smith PTC on 6-8-77 at 10AM R.2704 as to both defts. CANNELLA, J	

CONTINUED ON PAGE 2.

6-8-77 DEFT (Atty. present)
Bail application as to Deft Smith. Bail fixed at \$25,000.00
PRB Secured by \$1,000.00 CASH. Co-signed by his Aunt Mrs.
Esther Vaughn.
Bail Condition Deft Smith to report once a week to pre-trial
services Officer Mr. Rucks. CANNELLA, J

6-8-77 Filed appearance by in amt. of \$25,000 Co-signed by Ida Brown
and Esther Vaughn....

6-15-77 DEFT (atty Present, Leonard Joy) Hearing Begun on Motion
to suppress -

6-16-77 Hearing Continued - and Concluded.
DEC. RES- BAIL CONDITIONS CONT'D. CANNELLA, J

6-20-77 Filed defts memorandum of law.... In support of motion to
suppress....

6-21-77 DEFT (Atty Present) Suppression Hearing Reopened-
Hearing Concluded.
TRIAL ON WED. 7-13-77 at 10AM R. 601
DEC. RES. BAIL CONT'D. CANNELLA, J

6-27-77 Filed memorandum and order... Motion pursuant to 41(e) to
suppress a statement given to an AUSA is denied***
Cannella, J..... m/n

7-7-77 DEFT (Atty. present) PTC HELD AND CONCLUDED
Trial as to deft on 7-13-77 at 10AM R. 601
BAIL CONTINUED . CANNELLA, J

7-12-77 Filed affidavit of Robert N. Schwartz, AUSA in support of a
writ. RET: 7-13-77.

7-13-77 Filed Robert B. Fiske Jr. US Atty's application for immunity.
(re: Stanley McDuffie)

7-13-77 Filed Affidavit of Robert N. Schwartz, AUSA in support of
application for immunity..

7-13-77 Filed Order that Stanley McDuffie give testimony and provide
other information as to matters about which he may be
questioned before this Court and jury, etc. as indicated.
CANNELLA, J copy to US Atty. m-n Fed. Defender Service

7-15-77 AUSA Schwartz
DEFT (Atty. Present) DEFT REMANDED. CANNELLA, J

7-18-77 Issued Remand.

3-6-15-77 E

3-6-16-77 E

3-6-21-77 E

3-7-7-77 E-

CONTINUED ON PAGE NO. 3.

FINE AND RESTITUTION PAYMENTS					
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

DATE	PROCEEDINGS (continued) (Document No.)	CANNELLA, J	V. EXCLUDABLE DELAY			
			(a)	(b)	(c)	(d)
* 7-13-77	TRIAL BEGUN BEFORE CANNELLA, J WITH A JURY					
7-15-77	TRIAL CONTINUED - DEFT REMANDED					
7-18-77	TRIAL CONTINUED					
7-19-77	TRIAL CONTINUED - AND CONCLUDED JURY VERDICT DEFT GUILTY ON EACH OF COUNTS 1-2 and 3-JURY POLLED. P.S.I. Ordered. SENT ON: 9-6-77 at 10AM R. 2704 BAIL EXONERATED. DEFT REMANDED. CANNELLA, J					
7-26-77	Filed Govt's Memorandum of law.					
7-26-77	Filed Govt's requests to charge.					
7-26-77	Filed deft's proposed questions for the voir dire.					
8-1-77	Filed Magistrates temporary commitment dated 4-7-77....					
8-9-77	Filed Govt's Memorandum of Law in opposition to deft's motion to suppress.					
8-9-77	Filed Govt's Reply Memorandum of Law in opposition to deft's motion to suppress.					
8-19-77	Filed memorandum decision..Motion pursuant to Fed.R.Crim.P 41 (f) seeking to suppress a statement given by the deft***is hereby denied***In sum, the Court finds that Roland Smith was not detained for a longer period than was necessary.***the statements are admissible into evidence....Cannella, J.... (notified AUSA no address for defense counsel)					
8-25-77	Filed ERRATUM - re:Memorandum Decision filed 8-19-77. (first two lines of 2nd paragraph-pg.3)So Ordered.CANNELLA, J notified US.Atty.					
8-31-77	Filed transcript of record of proceedings, dated 6-15-77					
8-31-77	Filed transcript of record of proceedings, dated 6-16-77					
8-31-77	Filed transcript of record of proceedings, dated 6-20-77					
8-31-77	Filed transcript of record of proceedings, dated 7-15-77					
8-31-77	Filed transcript of record of proceedings, dated 7-13-77					

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELA			
		(a)	(b)	(c)	(d)
Sept.6-77	Filed Judgment(Atty.Leonard Joy)the deft is committed for imprisonment for a period of FIVE YEARS on Count 1, EIGHT YEARS on Count 2, EIGHT YEARS on Count 3 sentences tp run CONCURRENTLY WITH EACH OTHER....The Court recommends deft Smith to be placed in an Institution other than where deft Bellamy is to be incarcerated.....CANNELLA,J. Ent.on 9-7-77-----				
Sept. 6-77	Issued commitment and copies.....				
Sept.13-77	Filed commitment and entered return.Deflt delivered to M.C.C. on 9-6-77.				
Sept.13-77	Filed Remand that prisoner be remanded to custody of US Marshal. Dated: 7-18-77.				
Oct.4-77	Filed notice of appeal from judgment dated 9-6-77..Copy given to U.S.ATTY. and mailed to defts atty.L.F.Joy 2 Lafayette St. NYC				

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(S) 77CR280

UNITED STATES OF AMERICA,

Plaintiff,

-v-

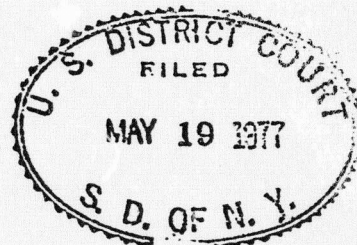
STANLEY McDUFFIE, a/k/a "Donkey,"
a/k/a "Duncan," ROLAND SMITH, and
ERNEST BATHEA, a/k/a "E.J.,"

Defendants.

INDICTMENT

S77 Cr. 280

Jmc.



COUNT ONE

The Grand Jury charges:

From on or about March 1, 1977, to on or about April 7, 1977, the defendants, STANLEY McDUFFIE, a/k/a "Donkey," a/k/a "Duncan," ROLAND SMITH, and ERNEST BATHEA, a/k/a "E.J.", conspired with each other and with FRED BELLAMY, a/k/a "Al," named herein as a co-conspirator but not as a defendant, to commit offenses against the United States in violation of Title 18, United States Code, Sections 2113(a) and 2113(d).

1. It was part of said conspiracy that the defendants, STANLEY McDUFFIE, a/k/a "Donkey," a/k/a "Duncan," ROLAND SMITH and ERNEST BATHEA, a/k/a "E.J." and co-conspirator FRED BELLAMY, a/k/a "Al", would and did, by force, violence and intimidation, take and attempt to take, from the person and presence of others property and money belonging to and in the care, custody, control, management and possession of the National Bank of North America, 200 Lexington Avenue, New York, New York, a bank the

MICROFILM

MAY 19 1977

deposits of which were then insured by the Federal Deposit Insurance Corporation.

2. It was further part of the said conspiracy that the defendants STANLEY McDUFFIE, a/k/a "Donkey," a/k/a "Duncan," ROLAND SMITH, and ERNEST BATHEA, a/k/a "E.J." and co-conspirator FRED BELLAMY, a/k/a "Al," would and did, in committing the offense described in paragraph 1 above, assault persons and put in jeopardy the lives of persons by the use of a dangerous weapon or device, to wit: a shotgun.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

1. On or about March 30, 1977, co-conspirator FRED BELLAMY, a/k/a "Al," entered the aforesaid National Bank of North America and threatened persons therein with a shotgun;

2. On or about March 30, 1977, defendants STANLEY McDUFFIE, a/k/a "Donkey," a/k/a "Duncan," and ROLAND SMITH entered the aforesaid bank and stole \$11,552.

3. On or about March 30, 1977, defendant ERNEST BATHEA, a/k/a "E.J." hailed a taxicab outside the aforesaid bank, while it was being robbed as described in Overt Acts 1 and 2 above, for the

purpose of providing transportation away from the aforesaid bank for himself, co-conspirator FRED BELLAMY, a/k/a "Al", and defendants STANLEY McDUFFIE, a/k/a "Donkey," a/k/a "Duncan," and ROLAND SMITH.

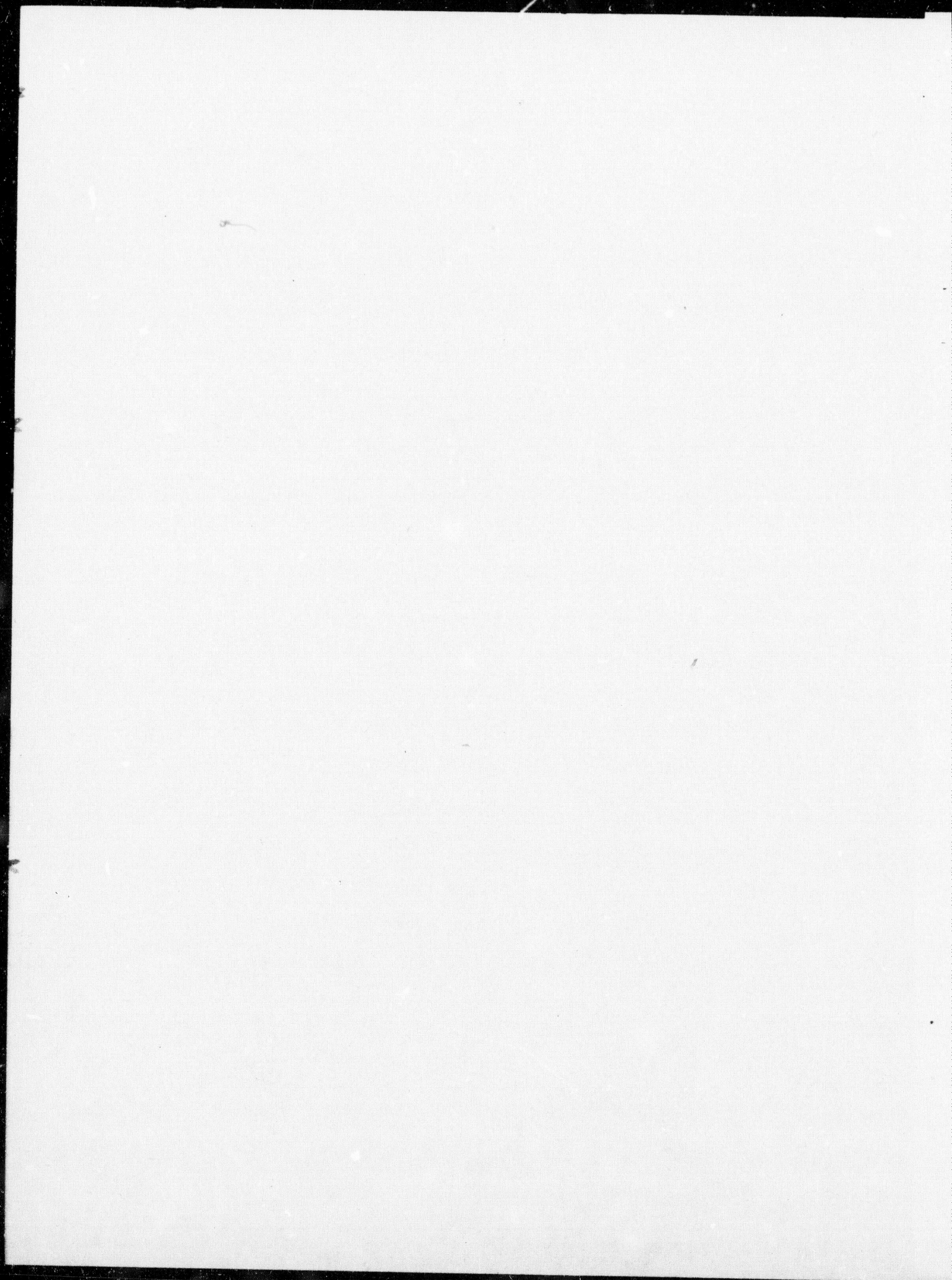
(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

On or about March 30, 1977, in the Southern District of New York, the defendants STANLEY McDUFFIE, a/k/a "Donkey," a/k/a "Duncan," ROLAND SMITH, and ERNEST BATHEA, a/k/a "E.J.", unlawfully, wilfully and knowingly, by force and violence and by intimidation, did take and attempt to take from the person and presence of others money belonging to and in the care, custody, control, management, and possession of the National Bank of North America, 200 Lexington Avenue, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Sections 2113(a) and 2.)



COUNT THREE

The Grand Jury further charges:

On or about March 30, 1977, in the Southern District of New York, the defendants, STANLEY McDUFFIE, a/k/a "Donkey," a/k/a "Duncan," ROLAND SMITH, and ERNEST BATHEA, a/k/a "E.J.", in committing and attempting to commit the offense described in COUNT TWO above, unlawfully, wilfully, and knowingly did assault other persons and put in jeopardy the lives of persons by the use of a dangerous weapon or device, to wit: a shotgun.

(Title 18, United States Code, Sections 2113(d) and 2.)

Arnold E. James
Foreman

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

JUDGE

United States District Court
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

STANLEY McDUFFIE, a/k/a "Donkey,"
a/k/a "Duncan," ROLAND SMITH, and
ERNEST BATHEA, a/k/a "E.J.",

Defendants.

JUDGE CANNELLA

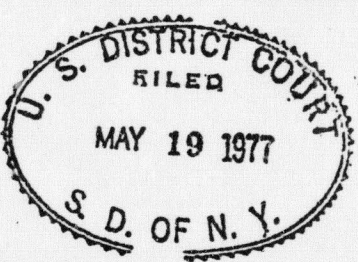
INDICTMENT
S77 Cr. 280

(18, U.S.C. § 371; 18, U.S.C.
§§ 2113(a) and 2.)

ROBERT B. FISKE, JR.
United States Attorney.

A TRUE BILL

Annie R. Tamm
Foreman.



referred to Cannella as being related
to and superceding Indictment
77 CR. 280 (JMC). Bench warrant
issued for Ernest Bathea, a/k/a
"E.J."
Stewart J.

MAY 23 1977

AUSA SHWARTZ

DEFTS. McDUFFIE & SMITH (ATTYS. PRESENT)

BOTH DEFTS. PLEA NOT GUILTY.

10 DAYS FOR MOTIONS.

BAIL CONT'D AS TO DEFT. McDUFFIE.
PT SERVICES TO LOOK INTO BAIL STATUS
AS TO DEFT SMITH.

PTE ON 6-8-77 AT 10AM R. 2704 AS TO
BOTH DEFTS.

CANNELLA J.

JUN 8 1977

AUSA SAMANTZ

DEFTS. McDUFFIE & SMITH - (ATTYS. PRESENT)

BAIL APPLICATION AS TO DEFT. SMITH. BAIL FIXED
AT 25000.00 PRB SECURED BY 1000.00 CASH. CO-SIGN
BY AUNT MRS. ESTHER VAUGHN.
BAIL CONDITION: DEFT. SMITH TO REPORT ONCE A WEEK
TO PRE-TRIAL SERVICES OFFICER MR. RUCKS.

8 1977

SUPPRESSION HEARING AS TO DEFT. McDUFFIE
ON 6-9-77 AT 10AM. —

CANNELLA, J.

9 1977

SUPPRESS HEARING BEGUN AS TO DEFT McDUFFIE. (ATTY. —
LAWRENCE LINZER PRESENT). MOTION DENIED. TRIAL
DATE SET FOR WED. 6-15-77. PRESENT BAIL
CONDITIONS CONTINUED. (MEMORANDUM TO BE FILED).

CANNELLA, J.

ANSA SHWARTZ

13 1977

DEFT. McDUFFIE (ATTY. PRESENT) LAWRENCE LINZER
W/ID PLEA OF NG, AND PLEADS GUILTY TO CT. 2 ONLY.
CTS 1 & 3 OPEN. — PSI ORDERED. SENT. ON 7-25-77
AT 10AM R. 601. — BAIL CONT'D —

CANNELLA, J.

JUN 15 1977

ANSA SHWARTZ

DEPT. ROLAND SMITH - (ATTY. PRESENT)
LEONARD JOY.

HEARING BEGUN ON MOTION TO SUPPRESS. -

JUN 16 1977 - HEARING CONTINUED - AND CONCLUDED -
DET. RES -

BAIL CONDITIONS CONT'D -

CANNELLA, J.

JUN 21 1977 -

ANSA SHWARTZ

DEPT. ROLAND SMITH - (ATTY. PRESENT)

SUPPRESSION HEARING REOPENED - HEARING CONCLUDED

TRIAL ON WED. 7-13-77 AT 10 AM R 601 DET. RES.

BAIL CONT'D

CANNELLA, J.

CANNELLA, J.

JUL 5-1977

AUSA SHAWNTZ

DEPT PRODUCED IN COURT ON A WRIT

DEPT. BATHER - (ATTY. PRESENT)

(LAWRENCE ALDEN BATHY)

225 BWAY, NYC 10007

962-8058

DEPT PLEADS NOT GUILTY ON EMBEL OF Cts. 1-2

BAIL FIXED IN THE AMOUNT OF \$50,000.00 CASH OR
SURETY. COURT DIRECTS PRE-TRIAL SERVICES
TO MAKE INVESTIGATION AS TO DEPT. BAIL STATUS
10 DAYS, TO MAKE MOTIONS.

WRIT ADVANCED TO 7-15-77

CANNELLA, J.

AUSA SHAWNTZ

7-7-77 - DEFTS. SMITH AND BATHER (ATTYS. PRESENT)

PTC HELD AND CONCLUDED - TRIAL AS TO DEPT
SMITH IN 7-13-77 AT 10AM R. 601.

TRIAL AS TO DEPT BATHER IN 7-25-77 AT 10AM R. 601.

BAIL CONDITIONS

CONT'D AS TO BOTH
DEFTS

CANNELLA.

AUSA SHWARTZ

JUL 13 1977

~~TRIAL BEGUN BEFORE CANNELL, J.~~

TRIAL BEGUN BEFORE CANNELL, J.
WITH A JURY AS TO DEPT. SMITH ONLY.

JUL 15 1977

— TRIAL CONTINUED — Klier Jones —
Remanded —

JUL 18 1977

— TRIAL CONTINUED —

JUL 19 1977

— TRIAL CONTINUED — AND CONCLUDED
JURY VERDICT — DEPT. GUILTY ON EACH OF COUNTS —
1-2 AND 3 — JURY FUBLED

PS I ORDERED. SENT. ON 9-6-77 AT 10 AM R. 2704
BAIL EXONERATED
DEPT. REMANDED

CANNELL, J.

OVER

ANSA SHWANTZ

JUL 25 1977

DEPT. produced in court on a writ

DEPT. ERNEST BATHER (ATTY. PATS. INT)

W/D plea of NG, AND pleads Guilty

to C+ 2 ONLY. CTS 1 AND 3 OPEN -

PSI ORDERED SENT. ON 9-6-77 AS 1044

R. 2764

Writ ADJUDGED 7-9-6-77

CANNELLA, J.

(RM)

AUSA SHWARTZ

JUL 25 1977

DEPT. STANLEY McDUFFIE (ATTY. PRESENT)
LAWRENCE LINZER

SENTENCED TO SIX (6) YRS. ON CT. 2.

COUNT RECOMMENDS: STANLEY URGES UPON THE
AUTHORITIES THAT DEPT. NOT BE PLACED IN
THE SAME INSTITUTION WITH ANY OF THE
OTHER DEPTS WHO ARE NAMED IN THIS
CASE AND PARTICULARLY DEPTS BELKAMY &
SMITH —

DEPT. MOVES TO DISM CTs 1 AND 3 —
GRANTED
NO OBJECTION BY GOVT —
DEPT. REMANDED —

CANNELLA, J.

AUSA SHWARTZ —

SEP 8 - 1977

DEPT. ROLAND SMITH — (ATTY. PRESENT)
LEONARD JOY.

SENTENCED TO 5 YRS ON CT 1, 5 YRS ON CT 2, 5 YRS ON CT 3,
SENTENCES TO RUN CONC. WITH EACH OTHER.

DEPT. REMANDED TO MCC FOR ^{REMANDED} ~~REMANDED~~
OF MONTH OF SEPTEMBER. —

DEPT. ADVISED OF HIS RIGHT TO APPEAR.

COUNT RECOMMENDS: DEPT. SMITH TO BE PLACED IN AN
INSTITUTION OTHER THAN WHERE DEPT. BELKAMY IS TO BE IN CARCERATE
CANNELLA, J.

ASH SHANATZ

SEP 6 - 1977

DET. ERNEST BATHIA (ATTY PRESENT)
RICHARD ROSENTHAL

SENTENCED TO 5 YRS ON CT 2, PURSUANT
TO TITLE 18, USC, SEC. 5010 (B)

DET. MOVES TO DISM. CTS 1 & 3 —
GRANTED —
NO OBJECTION BY GOV'T

CAPULELLA, J.

COURT RECOMMENDS: DET. BATHIA TO BE PLACED
IN AN INSTITUTION OTHER THAN WHITE BELLEVUE
IS TO BE IN CARCERATED.

2:ds
-2190

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----- -x

UNITED STATES OF AMERICA,

Plaintiff,

-v-

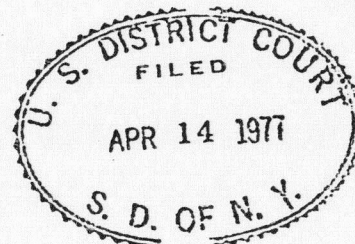
STANLEY McDUFFIE, a/k/a "Donkey,"
a/k/a "Duncan," and FRED BELLAMY,
a/k/a "Al,"

Defendants.
----- -x

77 CRIM. 0280

INDICTMENT

77 Cr.



COUNT ONE

The Grand Jury charges:

From on or about March 1, 1977, to on or about April 7, 1977, the defendants, STANLEY McDUFFIE, a/k/a "Donkey," a/k/a "Duncan," and FRED BELLAMY, a/k/a "Al", conspired with each other and with JOHN DOE ONE and JOHN DOE TWO, named herein as co-conspirators but not as defendants, to commit offenses against the United States in violation of Title 18, United States Code, Sections 2113(a) and 2113(d).

1. It was part of said conspiracy that the defendants, STANLEY McDUFFIE, a/k/a "Donkey," a/k/a "Duncan," and FRED BELLAMY, a/k/a "Al," and co-conspirators JOHN DOE ONE and JOHN DOE TWO, would and did, by force, violence and intimidation, take and attempt to take, from the person and presence of others property and money belonging to and in the care, custody, control, management and possession of the National Bank of North America, 200 Lexington Avenue, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

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APR 15 1977

2. It was further part of the said conspiracy that the defendants STANLEY McDUFFIE, a/k/a "Donkey," a/k/a "Duncan," and FRED BELLAMY, a/k/a "Al," and co-conspirators JOHN DOE ONE and JOHN DOE TWO, would and did, in committing the offense described in paragraph 1 above, assault persons and put in jeopardy the lives of persons by the use of a dangerous weapon or device, to wit: a shotgun.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

1. On or about March 30, 1977, defendant FRED BELLAMY, a/k/a "Al," entered the aforesaid National Bank of North America and threatened persons therein with a shotgun;

2. On or about March 30, 1977, defendant STANLEY McDUFFIE, a/k/a "Donkey," a/k/a "Duncan," and co-conspirator JOHN DOE ONE, entered the aforesaid bank and stole \$11,552.

3. On or about March 30, 1977, co-conspirator JOHN DOE TWO, hailed a taxicab outside the aforesaid bank, while it was being robbed as described in Overt Acts 1 and 2 above, for the purpose of providing transportation away from the aforesaid bank for himself, co-conspirator JOHN DOE ONE, and defendants STANLEY McDUFFIE, a/k/a "Donkey," a/k/a "Duncan," and FRED BELLAMY, a/k/a "Al."

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

On or about March 30, 1977, in the Southern District of New York, the defendants STANLEY McDUFFIE, a/k/a "Donkey," a/k/a "Duncan," and FRED BELLAMY, a/k/a "Al," unlawfully, wilfully and knowingly, by force and violence and by intimidation, did take and attempt to take from the person and presence of others money belonging to and in the care, custody, control, management, and possession of the National Bank of North America, 200 Lexington Avenue, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

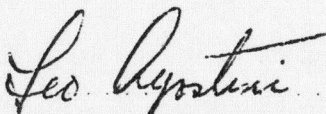
(Title 18, United States Code, Sections 2113(a) and 2.)

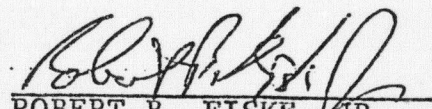
COUNT THREE

The Grand Jury further charges:

On or about March 30, 1977, in the Southern District of New York, the defendants, STANLEY McDUFFIE, a/k/a "Donkey," a/k/a "Duncan," and FRED BELLAMY, a/k/a "Al," in committing and attempting to commit the offense described in COUNT TWO above, unlawfully, wilfully, and knowingly did assault other persons and put in jeopardy the lives of persons by the use of a dangerous weapon or device, to wit: a shotgun.

(Title 18, United States Code, Sections 2113(d) and 2.)


Foreman


ROBERT B. FISKE, JR.
United States Attorney

United States District Court
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

STANLEY McDUFFIE, a/k/a "Donkey,"
a/k/a "Duncan," and FRED BELLAMY,
a/k/a "Al,"

Defendants.

INDICTMENT

77 Cr.

(18 U.S.C. §§ 371, 2113(a)(d)
and 2.)

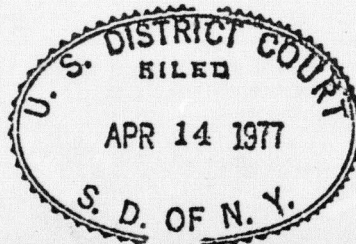
ROBERT B. FISKE, JR.

United States Attorney.

A TRUE BILL

Leo Agostini

Foreman.



JUDGE CANNELLA

Lasker

April 21, 1977—

Wgt Stanley Mc Huffie (atty: Dennis
K. SEKALOFF) pleads not guilty. Wgt.
Continued Remanded in lieu of it
fixed at \$50,000.

Wgt. Fred Bellamy - dpt. referred
to Magistrate for assignment of counsel.
Court directs a not guilty plea be
entered. Wgt. continued Remanded
in lieu of bail fixed at \$50,000. 9/0.
Assigned Cannella.
for all purposes. Stewart J.

NOTE: Case possibly related to 77 C-279
(LASKER, J.). #D

OVER

AVSA INTENSION

APR 27 1977

DEFTS. MCDUFFIE & BELLAMY (ATTYS PRESENT)

PTC HELD - 10 DAYS FOR MOTION AS TO
BOTH DEFTS. - COURT DIRECTS TO HAVE

PRE-TRIAL SERVICES MAKE A REPORT AS TO BAIL

PTC ADJ'D TO 5-9-77 AT 10AM R.2704.

BAIL CONDITIONS CONT'D.

CANNELLO, J.

AVSA STANWARTZ

APR 3-1977

DEFT. MCDUFFIE - (ATTY. PRESENT)

HEARING ON BAIL APPLICATION - BAIL FIXED

IN THE SUM OF \$10,000.00 OR \$1,000.00 CASH.

ON TERMS & CONDITIONS ON THE BOND AT
THE PRESENT TIME.

CANNELLA, J.

MAY 9 - 1977

ANSA SHWARTZ

DEPT. BALVANY (ATTY. PRESENT)

W/D PLEA OF NG, AND PLEADS GUILTY TO COUNT
2 ONLY. CTS 1 AND 3 OPEN.

PSI ORDERED. SENT. ON 6-7-77 AT COUNTY R. 2704.
PRESENT BAIL CONDITIONS CONT'D.

DO NOT APPEAR

CANNELLA J

DEPT. MCDUFFEE (ATTY. PRESENT)

PTC HELD AND ^{ADJUDICATED} ~~RECEIVED~~ TO 5-23-77 AT

10 AM R 2704. -

PRESENT BAIL CONDITIONS CONT'D -

CANNELLA J

ANSA SHWANTZ

5-23-77-

DEFT. MCDUFFIE - (ATTY. PRESENT)

GOVERNMENT MOVES TO DISMISS IND. CHARGE
77CR 280 - GRANTED -

CANNELLA J.

ANSA SHWANTZ

NOV 21 1977

DEFT. BELLAMY (ATTY. PRESENT)
RALPH NADEN

SENTENCED TO SIX (6) YRS ON COUNT 2 - AT A
PLACE OF CONFINEMENT TO BE DESIGNATED BY THE
ATTY. GENERAL OF THE U.S.

COUNT RECOMMENDS, DEFT. TO BE SENT TO AN

INSTITUTION SEPARATE FROM THE DEFTS.

STANLEY MCDUFFIE, RILAND, SMITH AND ERNEST BE

DEFT MOVES TO DISMISS CTS 1 AND 3.
NO OBJECTION BY GOVT GRANTED

RECOMMENDED - CANNELLA J.

(RM)

A TRUE COPY
RAYMOND E. BURCHARDT, Clerk
By: B. L. L...
Deputy Clerk

2 (In open court, jury present.)

3 CHARGE OF THE COURT

4 THE COURT: At the outset, I want to thank you
5 for the careful attention you paid to this case. We have
6 been the victims of the blackout and other inconveniences.
7 The day before we were frozen out, the day after we were
8 scalded.

9 So, you have been under trying circumstances
10 having to try a case which is essentially a simple case, in
11 a sense. However, it is an important case because we know,
12 of course, the integrity of the banks and the safety of the
13 banks is important to the general public.

14 We also know the defendant right here, should
15 he be convicted here, he will suffer punishment and face
16 probably a jail term.

17 The basic facts in the case are apparently
18 conceded by both parties in that they agree there was a bank
19 robbery that occurred on March 30, 1977 at the National
20 Bank of North America at 200 Lexington Avenue. It was then
21 stipulated between the parties that this bank is in fact
22 insured by the Federal Deposit Insurance Corporation. That's
23 the round seal you see on the door of the bank, FDIC, which
24 gives us the injured in this case. That's why the federal
25 people are involved.

1
2 It was also stipulated between the parties that
3 some \$11,552 was taken at the time of the bank robbery.

4 Now, while there are these various areas of
5 agreement between the parties, there is a very distinct
6 juxtaposition that they take as far as the fact whether or
7 not this defendant was there. The government says that he
8 was and was a participant. And the defendant, by way of
9 his plea of not guilty, has challenged each and every
10 material count in each one of the three counts and therefore
11 these issues of fact have arisen in the case and because of
12 these issues of fact you have been selected as jurors.

13 You are the sole and sovereign judges of the
14 truth in this case and you are the sole and sovereign
15 judges of the credibility of the witnesses who have appeared
16 in this case. Anything the lawyers have said about the
17 facts in the case or anything the Court has said about the
18 facts in the case does not bind you in any way.

19 You will find the facts yourself and they are
20 final and they are determinative as far as this case is
21 concerned.

22 On questions of law, however, you must take the
23 law from the Court and apply it to the facts.

24 The grand jury indicted this defendant on three
25 counts and he appeared in court and pleaded not guilty to

2 each of those three counts. Those are the issues that have
3 arisen in this particular case.

4 A defendant in a criminal case is presumed
5 by law to be innocent. That presumption remains with him
6 throughout the trial unless and until he is proven guilty
7 of the crimes charged by credible evidence beyond a reason-
8 able doubt. The burden of proving the defendant guilty
9 beyond a reasonable doubt rests upon the government. This
10 burden never shifts throughout the trial.

11 The Court does not require a defendant to prove
12 his innocence or to produce any evidence. He may rely on
13 evidence brought out on cross examination of witnesses for
14 the government. If the government fails to prove the
15 defendant's guilt beyond a reasonable doubt, it is your
16 obligation to acquit him.

17 The defendant in addition to not producing
18 evidence or doing anything in the case has an absolute
19 right not to testify and you may not draw any presumption
20 of guilt or inference against the defendant because he did
21 not testify.

22 The tool used by both parteis, if they desire to
23 present facts to the jury, is called evidence. And evidence
24 can be divided in a number of ways. The first division, I
25 would imagine, of evidence is its quantitative and qualitative

2 qualities. In other words, how much do you need and what
3 kind of evidence should it be?

4 The quality of the evidence must be credible
5 evidence. That is you must believe it. It must be believable
6 evidence.

7 The amount of evidence or the quantum of evidence
8 must be beyond a reasonable doubt. A reasonable doubt means
9 a doubt which is based on reason and must be a substantial
10 rather than a speculative doubt. It must be sufficient to
11 cause a reasonably prudent person to hesitate to act in the
12 more important affairs of his life.

13 Evidence can also be divided into three categories
14 as far as it applies to this case. The first item, that is,
15 where the witness comes into court and takes an oath and
16 swears to you what he has either seen, heard or by way of
17 his senses learned. It includes any natural inferences
18 that flow from that testimony and it also includes anything
19 that is brought out any time he is on the witness stand
20 either by direct or cross examination.

21 The exhibits in the case have already been
22 described to you by one of the lawyers and they are available
23 for you. The ones that were only marked for identification
24 are not available and they are not in evidence. You might
25 wonder about that FBI statement that was taken from the

2 defendant, that was only marked for identification. So
3 you can't physically take that statement into the juryroom
4 with you and look at it. But the testimony and what that
5 statement contains is in the record. So that if you want
6 to hear that again, all you have to do is make a request
7 and the reporter will read it to you even though you don't
8 physically see the statement because the statement itself
9 has not been marked into evidence.

10 The stipulations in the case I have mentioned
11 two of them to you already. One, that this is an FDIC
12 bank, and the other, the amount of money involved. And
13 any stipulation that has been mentioned during the course of
14 the case is evidence in the case and must be considered by
15 you.

16 Another way of dividing evidence is into what
17 is called direct evidence and circumstantial evidence. A
18 defendant may be proven guilty by either direct or circum-
19 stantial evidence. Direct evidence is the testimony of one
20 who asserts actual knowledge of a fact such as an eye-witness.

21 Circumstantial evidence is proof of a chain of
22 facts and circumstances indicating the guilt or the innocence
23 of the defendant.

24 The law makes no distinction between the weight
25 to be given to either direct or circumstantial evidence. It

2 requires only that you, after weighing all the evidence in
3 the case, and that's an important word in there, all, you
4 don't decide this case on one charge by the Judge, one
5 specific statement made by the Court as to the law, one piece
6 of evidence, one thought that you have. That is not the
7 way to decide the case.

8 You must decide the case on all the evidence
9 that's been produced during the course of this trial. You
10 must be convinced of the guilt of the defendant beyond a
11 reasonable doubt before he can be convicted.

12 One of the chief uses of circumstantial evidence
13 is for mental operations. We know that you can't see a
14 person think. We don't know what he is thinking and you can
15 look at him as long as you want and you still won't know what's
16 going on in his head.

17 The requirements of these particular laws re-
18 quire mental operations. Namely, you must act unlawfully,
19 you must act willfully and you must act knowingly. Those
20 are all mental operations. So, you use circumstantial
21 evidence to determine the mental operations in this case.

22 Now, I will describe to you what is evidence.
23 I will describe to you what is not evidence because it is
24 important for you to exclude things which are not evidence
25 from your mind when you are deciding this case.

1
2 The first thing I call your attention to is the
3 indictment in this case which contains the three counts.
4 This isn't evidence that the crime was committed. This
5 indictment is only an accusation. It was the manner in which
6 the charge was presented by the grand jury to which the
7 defendant has pleaded not guilty. So that you can't deter-
8 mine the case by the fact that there is an indictment and,
9 in fact, he is guilty of the crime.

10 That is only the beginning of the case. That is
11 where it starts. That is the accusation. There was no
12 trial there, as I told you when you were picked as a jury.
13 The defendant's lawyer was not there. The defendant was
14 not called. It was a one-sided affair.

15 This is the trial and this is where you make
16 a determination as to whether this defendant is guilty or
17 innocent of the charges in the indictment.

18 Questions are not evidence in the case. Suppose
19 a question were asked, well, to give you one that you
20 probably heard of before--"When did you stop beating your
21 wife?" This, of course, is to a male. There are other
22 relationships, I guess, that could be female or male.

23 But, in any event, the point of the matter is
24 "When did you stop beating the other person?" That does not
25 mean because it is included in that question that there was

2 any beating at any time. That would have to be proved.

3 If there was an objection to that question, and
4 there was no answer, you couldn't assume during the course of
5 deliberations, well, he beat the person up. Because that
6 would have to be proven.

7 In other words, what's evidence in the case is
8 not the question but the answer. That's the evidence in
9 the case.

10 Certain matters were stricken upon motion of
11 either one lawyer or the other. Those you will have to
12 forget about because they are not evidence unless they have
13 been proven by other answers in the case.

14 I have already told you about exhibits which are
15 marked for identification only. They are not evidence. The
16 comments of the lawyers and the Court are not evidence.
17 There is only one exception to this and I think it was more
18 or less tacitly agreed that Mr. Joy could become a witness
19 in this case by reporting how long it took a witness to
20 hear the two noises and that was eight seconds, as I recall
21 it. He was a witness at that time and he was not sworn, but
22 he was testifying that the sweep second hand on the face of
23 his wristwatch was eight seconds.

24 Comments by the Court on court rulings are not
25 to guide you as far as the facts are concerned. They are

only for the assistance of lawyers. Anything I said as far as any rulings are concerned should not control your findings of the facts.

Now, how do you evaluate and where do you find where the truth lies? Well, Anglo-Saxon juries and Anglo-American juries for many years have been using certain norms and standards. I will describe some of them. The first is the demeanor of the witness. How he appears on the stand, how he acts, how he responds to a question. Does he ask a question in a vague time? Does he evaluate the question? Does he appear to you to be telling the truth?

In other words, what you are supposed to do is use your common sense. That same common sense that you use in your everyday lives in matters of great importance to you, that same discernment that you would make in buying a car or a house; something that is important to you as a big venture.

The interest of witnesses who appear are important. You must look into the interest that the witness has.

There were police officers here, there were bank officers--not police officers but FBI men. There were bank officials here and in light of their background, you will consider what effect, if any, that has on their case.

Now, if any witness has falsely testified to any material fact, you may disregard that portion of his testimony

2 which is false and you may accept the rest of it or may
3 disregard and not accept any of it at all. I would tell
4 the ladies about how this rule operates and the men will
5 understand also by the example I give, I think. It is some-
6 thing that happens in my house. If, for example, my wife
7 makes an omelette and there is a rotten egg in the omelette,
8 nobody gets to eat that omelette, and my wife throws it away.

9 That's where you say, I don't believe he testified
10 truthfully here and therefore I will disregard him completely.
11 And you can do that.

12 On the other hand, what happens not infrequently
13 in my house is that the toast is burnt and my wife, being
14 Swiss, and very frugal, they have very small pocketbooks,
15 she scrapes the burnt toast off the bread and I have to
16 eat the rest of it. That's where you accept part of it
17 and you don't accept the rest of it.

18 Now, there are certain definitions that are in-
19 volved in this case and certain descriptions of words that
20 appear in the indictment which I will either define or
21 describe to you.

22 The first that comes to mind is this question of
23 the statement that was made by the defendant down here in
24 the U.S. Attorney's office. That's in the area of what is
25 called admissions and confessions. The difference between

1 an admission and a confession is, that an admission only
2 talks about a particular part of a crime. For example,
3 if I were charged with robbing a grocery store and at the time
4 I had a gun and if the police officer interrogated me and
5 said, "Do you have a gun?" and I said, "Yes," that would be
6 an admission, it wouldn't be a confession.
7

8 It does not describe the whole crime. A confes-
9 sion describes the whole crime. I will refer to this par-
10 ticular statement as a statement and you can determine your-
11 self whether it was an admission of the whole crime or whether
12 it was an admission of parts of the crime and and if it was
13 the whole crime, of course it would be a confession.

14 In either event there is a rule that applies
15 to this which I will make known to you.

16 Evidence has been introduced that the defendant
17 made certain statements relating to the crime charged in
18 the indictment. You must weigh such statements with
19 caution and scrutinize the circumstances surrounding them de-
20 termining whether they were freely and voluntarily made.

21 If you find that such statements were made
22 freely and voluntarily with the knowledge that such statement
23 is an expression of what happened and it was made without
24 fear or coercion, either physical or psychological or a
25 promise of reward, you may consider the statements together

2 with all of the other evidence in the case in determining
3 the guilt or innocence of the defendant.

4 However, if you find that the statements were not
5 made freely and voluntarily, you should disregard them
6 entirely. In this area, the only evidence you have would be
7 what the FBI men recited to you as to what happened at the
8 various times when he was given the various warnings and the
9 other testimony concerning this area. And considering that,
10 you will then make a judgment in this area.

11 Now, when there is more than one defendant named
12 in an indictment, and there is more than one defendant named
13 in this indictment and you will get a copy of this so you
14 will be able to see it, then of course certain rules apply.
15 One of them is the fact that co-defendants pleaded guilty is
16 not evidence of the guilt of any other defendant or that the
17 crime charged in the indictment was in fact committed. The
18 guilt or innocence of the defendant on trial must be deter-
19 mined by you solely upon the evidence which has been intro-
20 duced in this case.

21 Now, wherever there are two or more persons
22 charged with the commission of a crime, the guilt of the
23 defendant may be established without proof that all the
24 defendants perpetrated every act constituting the crime
25 charged. However, you must give separate consideration to

each individual involved and to each separate charge against that individual. Each person is entitled to have his case determined from his own conduct and from evidence that is applicable to him.

So that in this particular case the only defendant you are considering as far as rendering a verdict is concerned is the defendant Smith. The others who are named as co-defendants in the case have already pleaded guilty as indicated and they came here and testified.

Now, another area of the law which is important for you to understand is what is called the law of accomplice testimony. Some of you who sat in the state court, this is different than in the state court. You may not use what you remember about the state court practice in this area.

An accomplice is one who assists or unites with another person or persons in the commission of a crime voluntarily and with criminal intent. That's Bellamy and McDuffie. An accomplice does not become incompetent as a witness because of his participation in a crime charged.

On the contrary, the testimony of an accomplice applies alone--and this is where we differ from the state court. The state court would require corroboration. There is no corroboration required under federal law. The testimony of an accomplice alone, if you believe it, may be of

sufficient weight to sustain a burden of guilt even though it is supported by any other evidence.

In this case, of course, the government not only claims that there was accomplice testimony but that there was an abundance of corroborative testimony by way of the witnesses who appeared and by way of the statement and by way of other testimony which is in the case and which you will consider.

However, you should keep in mind that such testimony is always to be received with great caution and weighed with great care. You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe that the unsupported testimony is true beyond a reasonable doubt.

In this case I charge you that as a matter of law Bellamy and McDuffie were accomplices as a matter of law. As such, their testimony should be closely examined and weighed with great care. As to McDuffie and Bellamy, keep in mind they have pleaded guilty to count 2 of this indictment and they have not been sentenced yet. You must consider whether their testimony was influenced by the hope of lighter sentence, which they might expect to receive in turn for their cooperation in this case.

At the same time, however, the fact that McDuffie

1 and Bellamy have pleaded guilty to count 1 of this indictment
2 is not to be considered by you as evidence of the guilt of
3 the defendant or that the crime charged in the indictment
4 was in fact committed. The guilt or innocence of this de-
5 fendant on trial must be determined solely from the evidence
6 which has been introduced against him during the course of
7 this trial.
8

9 Now, one of the witnesses indicated, and I guess
10 more than one, that they had a criminal conviction, for
11 example, Bellamy convicted of other robberies.

12 The testimony of a witness may be discredited
13 or impeached by a showing that the witness has been con-
14 victed of a felony. That is a crime punishable by im-
15 prisonment for a term of years. The conviction does not
16 render the witness incompetent to testify but is merely a
17 circumstance which you may consider in determining the
18 credibility of the witness.

19 It is entirely within your province to determine
20 the weight to be given to any conviction as to impeachment.

21 As I indicated during the course of this trial,
22 I guess in your presence with Mr. Joy at one time, that you
23 should consider the nature of the crime the man is charged
24 with because it may have nothing at all to do with the
25 ability to tell the truth. An assault case, for example, in

and of itself, a person convicted of assault, that may not necessarily indicate that he would not be able to tell the truth.

Whereas, a case involving perjury, then of course that would be a question of lying and that would be relevant.

You look into the background of what the testimony in this case was and then determine how you are going to use that testimony.

Now, the indictment in this case contains three counts. A conspiracy count and what are called substantive counts. Counts are described as substantive counts when they allege a violation of a particular section of the law. In this particular case, 2113(a) and 2113(d), laws passed by Congress. One would be no bank robbery, that's (a), and two is (d), no robbery or assault or where you put somebody in jeopardy. Those are separate counts. Those are described in counts 2 and 3 of the indictment.

The first count is a conspiracy count. Now, sometimes the statute itself contains the conspiracy charge. For example, this statute could have been written, if you conspire or rob a bank. But that isn't what Congress did. What they did was leave it to the general section, which is 371 and that general section says that you may not conspire

1 against the United States or defraud the United States.
2
3 Then if you do an act in furtherance of that, the conspiracy
4 has been established even though nothing further has gone
5 on and it is not successful.

6 In this case, of course, it is claimed that it
7 is successful and they divided the money and it was suc-
8 cessful as far as they were concerned. But the conspiracy
9 does not require success. The conspiracy is a separate
10 crime as a violation from the substantive charge. Congress
11 did this purposefully. They feel this is a separate crime
12 and they feel that when people conspire together it means
13 a danger to society.

14 Then we have in this case three separate charges.
15 Count number 1 is the conspiracy. Count number 2 is the
16 bank robbery and count number 3 is the bank robbery with
17 assault or with jeopardy. That's short phrasing of the
18 charges. I will give you the elements in greater detail
19 later on. They don't appear to be very important here,
20 except that they are important in that you must find them.

21 Because the parties agree that this incident took
22 place and really the nub of the issue is was he there.
23 So, these elements are important and you must find them.
24 But they are directing your attention and they are focusing
25 your attention on that point. That's what they say you should

do in order to decide this case and I think they are right.

This is the issue in the case. But you must still find these elements which I will describe to you.

Now, the three counts contain the words "unlawfully, knowingly and willfully." When you read the indictment you will see them in there. To act knowingly as used in this indictment means that the act was done voluntarily and freely and purposefully and not because of mistake or accident. Knowledge may be proven by the defendant's conduct and by all the facts and circumstances surrounding the case.

The word "willfully" means practically the same thing except it adds another element, namely, that you do it with bad intention, what the Romans called the mens rea, the evil mind.

The word "willfully" as used in this particular sense means that the act was committed by the defendant voluntarily with a knowledge that it was prohibited by law and with the purpose of violating the law and not by mistake, accident or in good faith.

What we mean by "unlawfully" is simply against the law and I have told you what sections of the law were involved, those three sections I just mentioned a few minutes before.

These crimes can't be committed by accident.

1 You must have what is called intent. It has been stated
2 frequently that you must bring into the jury box, and I
3 mentioned before, your common sense and your experience in
4 your daily lives. It is obviously impossible to ascertain
5 or prove directly what was the direction of the mind, the
6 intention of the defendant. You cannot look into a person's
7 mind to see what his intentions were. But a wise and intel-
8 legent consideration of all of the facts and circumstances
9 shown by the evidence and the exhibits in the case will
10 enable you to infer with a reasonable degree of accuracy
11 what was the defendant's intention at the time he committed
12 the act.
13

14 The circumstances in this case require proof
15 that specific intent be in the mind of the defendant before
16 he can be convicted. Specific intent, as that term implies,
17 means more than the general intent to commit an act. To
18 establish specific intent the government must prove that
19 the defendant knowingly did an act which the law forbids
20 purposefully intending to violate the law.

21 Now, when there are multiple defendants it is
22 possible for a person to commit a crime even though he does
23 not partake in every single act that's going on. The reason
24 for that is that Congress again passed a law which is called,
25 roughly, aiding and abetting. I think it is Section 2 of

Title 18.

The guilt of the defendant may be established without proof that he personally did every act constituting the offense charged. This is so because a federal statute provides "whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures, they ran out of words, "the commission or who willfully causes an act to be done which if directly performed by him or another would be an offense against the United States punishable as a principal."

In order for you to find that the defendant aided and abetted another in the commission of a crime, it is necessary that you find that he knowingly and willfully associated himself in some way with the venture knowing the essential elements thereof and willfully participated so as to make it succeed.

One who aids and abets in the commission of a crime is equally guilty as the person who actually and physically commits it.

The institution here is a bank within the meaning of the wording of the statute because it says under the code which the Congress passed, 2113(f), any member of the Federal Reserve System and any bank, banking institution, trust company, savings bank or other banking device,

organization and operating under the laws of the United States and, this is the operative part, any bank the deposits of which were insured by the Federal Deposit Insurance Corporation.

That's what the description of the bank is and when the indictment talks about a bank, if it fits that description, then that is satisfied.

Now, there is a word in here which says in the second count, I believe it is, that there must be what they describe as intimidation. In other words, the acts were done by force and violence and by intimidation. Intimidation is a word which is derived from the Latin timeo, which means fear in Latin and timidus means to make timid. This word from Latin indicates that what we are talking about is a person being put in fear or being made timid. If the conduct of these parties that were in the bank had that effect, then it would be satisfied, that section of that count would be satisfied.

It also goes on to say that the money must be taken from the premises of others. It must be taken from the person and the presence of others. It does not have to be both. In other words, these bank robbers didn't have to take the money from those tellers physically from their hands. It could be taken from their presence. That would

satisfy it.

When they are talking about possession here, because that's also described in here, the money belonging to and in care of the custody, control, management and possession of the National Bank. Possession is not a concept that depends upon ownership. This money that was taken could have been owned by people that were or corporations that did business with the bank. When we talk about possession, we mean the ability to exercise dominion over something.

When these tellers had the money in the drawer they had the ability to reach into the drawer and take the money out. That's the kind of possession we are talking about and that's the kind of possession the statute is talking about. There must be that kind of possession in the case in order for you to find that element to be satisfied.

The next element that's described in the third count is that there was an assault. The language is "unlawfully, willfully and knowingly did assault another person." Well, any willful attempt or threat to inflict injury upon the person or another when coupled with apparent present ability to do so or any apparent display of force which would give the victim a reasonable fear and expectation of immediate

bodily harm constitutes an assault. There must be present an ability to do something. If somebody calls up from Chicago and he says, "I'm going to punch you in the nose," that's not the presence of assault because the fellow is in Chicago some 1800 miles away.

These people were in the bank. One guy was standing right along side of him, and one, from the testimony, is alleged to be slapping another woman around. That was an assault. That was an uninvited slapping. I think, under the circumstances in the bank here, that's the element of the assault involved in this case.

The second part of that count 2 is after the assault it says, "and put in jeopardy the lives of persons. There again it says, "and," but the government does not have to prove both. You either prove the assault or prove putting the people in jeopardy.

To put in jeopardy the life of a person by the use of a dangerous weapon or device. A dangerous weapon or device includes anything capable of being readily operated, manipulated, wielded or otherwise used by one or more persons used to inflict bodily harm on another person.

An operatable weapon such as a sawed off shotgun would be found to be a dangerous weapon. To put somebody in jeopardy with a dangerous weapon means to expose such a

1 person to the risk of death or fear of death by the use of
2 such dangerous weapon or device. You are permitted to
3 infer that a gun used or carried during the robbery was
4 loaded. And, in addition to that, in this particular case
5 we have the testimony of a witness who said that it was
6 loaded. So that concerns some of the definitions that are
7 involved in this indictment.
8

9 There was another definition involved in the
10 first count of this indictment which is the conspiracy.
11 The defendant had been indicted in count 1 for the crime
12 of conspiracy to commit an offense against the United
13 States in violation of Section 371 of Title 18, United
14 States Code.

15 To convict the defendant of this offense the
16 government must prove beyond a reasonable doubt the existence
17 of a conspiracy to commit an offense in violation of 2113 of
18 Title 18. That's the bank robbery section, and that the
19 defendant was a knowing and willful member of the conspiracy
20 and that during its committence at least one overt act was
21 committed by one or more of its members in furtherance of
22 the object of the conspiracy.

23 That may sound a little complicated to you but
24 essentially it isn't. The conspiracy definition in the
25 statutes simply says, if you have an agreement you haven't
committed a crime unless you commit what is called an overt

1 act. That's a word that comes to us really from the Norman
2 French. At one time they conquered England and they imposed
3 their system of government on the English. So a lot of the
4 terms that we use here are actually Norman French.
5

6 Jury is a Norman French term. Grand jury is,
7 petit grand jury, which you are. This term here, overt, is
8 a Norman French term as distinguished from covert and that's
9 also a Norman French term. Covert means hidden, overt means
10 open. So what we say under our law is that you can't be con-
11 victed of something for thinking about it. Just thinking
12 about it.

13 You have got to do something. Some overt act
14 to show that you are going to do something about it and that
15 completes the conspiracy. For example, if you are going to
16 rob a bank and I go to the five and ten, I am going to get
17 caught one of these days and I buy a flashlight in the five
18 and ten. That's perfectly legitimate. There is nothing
19 wrong with that. Anybody can buy a flashlight, as a matter
20 of fact, I guess a lot of people would have hoped they
21 would be open at 9:30 a few days ago and bought some them-
22 selves. That's a perfectly legal act.

23 But the point of it is using it for going around
24 in the nighttime to a bank to rob it, that makes the agree-
25 ment a crime because now you have done an overt act.

1
2 A conspiracy is a combination of two or more
3 persons to accomplish an unlawful purpose. While it
4 involves an agreement to violate the law, it is not
5 necessary that the people meet together and form an express,
6 formal agreement or that they state in words or writing what
7 the schemewas or how it was to be effected.

8 It is sufficient to show that they tacitly came
9 together and had a mutual understanding to accomplish an
10 unlawful purpose. In this case you also have the testimony
11 about the conversations between the parties which in effect,
12 if you believe it, couldn't establish if you so desire to
13 find that there was an agreement. Such agreement may be
14 inferred from the circumstances and conduct of the parties.

15 Since ordinarily a conspiracy is characterized
16 by secrecy, in determining whether a conspiracy exists,
17 you should consider the actions and declarations of all the
18 alleged participants. In determining whether the defendant
19 was a member of the conspiracy, you should examine and con-
20 sider all the evidence in the case.

21 Mere association alone not establish a
22 conspiracy nor is a conspiracy without participation suf-
23 ficient to constitute membership. What is necessary is that
24 the defendant participated with knowledge of at least some
25 of the purpose of the conspiracy with intent to aid and

accomplish the unlawful ends.

To be a member of the conspiracy a defendant need not know all the other members, nor all the details of the conspiracy nor the means by which the object were to be accomplished. Each member of the conspiracy may perform separate and distinct acts. It is necessary, however, that the government prove beyond a reasonable doubt that the defendant was aware of the common purpose, was a willing participant with intent to advance the purpose of the conspiracy.

The extent of the defendant's participation is not determinative of his guilt or innocence. His financial stake, if any, in the venture is a factor to be considered in determining whether a conspiracy existed and whether the defendant was a member of it. If it is established beyond a reasonable doubt that a conspiracy existed and that the defendant was one of its members, then all the acts and declarations of the other members in the conspiracy in or out of his presence done in furtherance of the conspiracy are attributable to the defendant.

I have already told you about the overt act. So as far as count 1 is concerned, this is the first charge in the indictment, which appears on the first two pages of this indictment. You will get a copy of this to bring in

2 with you.

3 The government will then prove these elements
4 before you can convict him of the conspiracy. First that
5 there was a conspiracy as charged in the indictment. In
6 other words, the agreement that you have heard during the
7 course of the trial. Secondly, that the defendant knowingly,
8 willfully and unlawfully associated himself with the con-
9 spiracy. Third, that one of the conspirators committed an
10 overt act as set forth in the indictment.

11 The overt acts are set forth in here. You must
12 find at least one of them. The first one, for example, is
13 that on March the 30th, Bellamy entered the National Bank of
14 North America and threatened persons therein with a shotgun.

15 Well, he took the stand and said he did that.

16 Now, it is up to you whether to believe him or
17 not. There are other witnesses who said they saw him there
18 with the gun. The first witness on the stand saw him and
19 he was right behind him. Only one of those need be proven.
20 You need go no further. You don't have to make a finding on
21 all of those.

22 When you get through considering the elements
23 which I described to you, you make one vote on the conspiracy
24 count. You don't vote on every paragraph and every overt
25 act. Your vote on the conspiracy count will be either guilty

2 or not guilty. You make no other findings as far as the
3 other sections in that count are concerned.

4 If you found that the government has proven
5 these three elements which I have described to you by
6 credible evidence beyond a reasonable doubt you will convict
7 the defendant on that count.

8 On the other hand if you find that the government
9 has failed to prove either one more or all of the elements
10 you are obliged and must acquit the defendant.

11 The second count is the bank robbery count. The
12 statute reads as follows:

13 "Whoever by force and violence or by intimidation
14 takes or attempts to take from the presence of a person any
15 property or other thing in care, custody, control or manage-
16 ment in the possession of the bank and deposits of which are
17 insured by the FDIC is guilty of a crime."

18 There must be this proof in the case. Each one
19 of these must be proven by the government beyond a government
20 beyond a reasonable doubt.

21 We will just run right down here. This is the
22 short count. It says that on or about March 30, 1977, so
23 it must have happened on or about that date. There doesn't
24 seem to be any dispute about this. Everybody is talking
25 about the same date.

1
2 In the Southern District of New York, and I
3 tell you as a matter of law that the bank which is located
4 on Lexington Avenue on 32nd Street is within the Southern
5 District of New York.

6 The defendant, and therein it names then, un-
7 lawfully, willfully and knowingly and there I have defined
8 those terms for you, they acted freely and voluntarily, not
9 through mistake or inadvertance and they acted for the purpose
10 of violating the law.

11 Then by force and violence and intimidation and
12 here you will make a determination whether there was intimi-
13 dation and if there was that would satisfy that part of the
14 count, did take, and attempt to take. Well, the charge here,
15 of course, is that they took it and there does not seem to
16 be any dispute about the money being taken from the bank and
17 it was even stipulated that the amount was \$11,552.

18 And that that was belonging to and in care and
19 custody, control, management and possession of the National
20 Bank. There does not seem to be any dispute that it was
21 taken from the drawers. A bank, the deposits of which were
22 insured by the FDIC. There again there is a stipulation
23 that this was a bank covered by such authority. That would
24 have to be found as a fact by you.

25 If you find these elements as I described them

1 to you be credible evidence beyond a reasonable doubt,
2 then you should convict the defendant of that count.
3

4 On the other hand, if you find the defendant,
5 rather, the evidence has failed to show that beyond a
6 reasonable doubt as to any one or more or all of those
7 elements, then you would be obliged and you must acquit the
8 defendant on that count.

9 We now come down to the last count. In the last
10 count it simply is a role up of the second count. There
11 are only two added elements in here. If you commit a robbery
12 and you do it by way of assault or by putting in jeopardy,
13 as I described before, then you, in addition to being guilty
14 under count 2, would be guilty under count 3.

15 So that count 2 and count 3 the proof is the
16 same. If you found the defendant not guilty of count 2,
17 you cannot find him guilty of count 3. There must be a
18 bank robbery first before you can establish that it was done
19 either by assault or jeopardy.

20 We are talking about the last count, count 3,
21 the fact that it must be a bank robbery plus an assault or
22 putting in jeopardy. In order to find the defendant guilty
23 of count 3, you must first find that he committed the crime
24 as charged in count 2. In addition, you must find beyond a
25 reasonable doubt that in doing so he aided and abetted in

2 the assault of one or more persons or by the use of a
3 dangerous weapon which was loaded, a sawed off shotgun, put
4 in jeopardy the lives of one or more persons.

5 That is essentially saying that in order to
6 convict on count 3 you must find either one of two things
7 in addition to the bank robbery. First, that there was an
8 assault. He didn't have to physically do it himself if you
9 find that he aided and abetted in the commission of this and
10 the assault was done by the other fellow that was with him,
11 I guess it was McDuffie, I mean the testimony says that.

12 I am not saying that he was. That is a deter-
13 mination you will have to make. But even though he didn't
14 slap the teller, if he was there and he was trying to make
15 it succeed and he was part of it, then under aiding and
16 abetting he would be responsible for that assault also.

17 That includes also the question of the gun. The
18 same discussion applies to that. He didn't have to physically
19 have to hold the gun himself. Bellamy held the gun, pro-
20 vided you find that he aided and abetted in this venture.

21 The crux of the case, as the lawyers have in-
22 dicated to you, is the so-called whether or not he was
23 there or not. This you will have to determine from all the
24 evidence in the case, not from one particular piece of
25 evidence in the case. For example, a statement made by Mr.

2 Joy that you must decide this case on the photograph and
3 if you can't identify him on the photograph that's the end
4 of the case. That's not so. Because the photograph may not
5 be sufficient to help you. You may still have doubts. You
6 must then go on to any other evidence in the case which will
7 assist you here.

8 That means the totality of the evidence. The
9 evidence of the other witnesses and his own statement and
10 other aspects of the case. You are not sitting in this case
11 to determine whether or not you can by looking at a series
12 of pictures make a determination as to who they depict or
13 who they don't depict. That's not your function. Those
14 are to assist you. If they don't assist you, then you go
15 by and go to the evidence that does assist you and consider
16 the whole case.

17 It is upon such a determination that you will
18 make a finding in this case. Sympathy and bias are not part
19 of your deliberations. We have places where we go for
20 sympathy and unfortunately some places where you go to
21 vent your bias. But, in any event, this is not the place.
22 Here we are dealing with this case on your sworn oath and
23 that is to decide the case upon the evidence as you hear it
24 in the courtroom and the law as it is given to you by the
25 Court.

Punishment in this case is not part of your

1 function. You have heard 60 years bandied about, 20 years
2 and so on. Fortunately for you and unfortunately for me
3 that devolves upon the Court and so you are not to consider
4 that at all. As a matter of fact, if you think about it
5 for a minute, it can't help you at all about the facts.
6

7 What he would be punished if he were found
8 guilty would not help you at all with the facts. Divorce
9 those considerations from your mind and try this case with-
10 out fear or favor anyhow.

11 The verdict must represent the considered judg-
12 ment of each one of you jurors. In order to return a verdict,
13 it is necessary that each of you jurors agree thereto. Your
14 verdict must be a unanimous verdict. All twelve must agree.

15 It is your duty to consult with one another and
16 to deliberate with a view toward reaching an agreement if
17 you can do so without violation of your independent judgment.

18 Each of you must decide the case for yourself.
19 But do so only after an impartial consideration of all the
20 evidence in the case with your fellow jurors. You are not
21 partisans in this case. You are not representing either
22 side. You are the judges of the facts in this case. Your
23 sole interest is in arriving at the truth from the evidence
24 that you have heard during the course of this trial.

25 Do not hesitate to examine your own views and

1 change opinions if you are convinced that you were wrong.
2 But don't surrender your honest conviction as to the weight
3 and effect of the evidence solely because of the opinion
4 of fellow jurors or for the mere purpose of returning a
5 verdict.
6

7 You must consider each count separately and make
8 a judgment on each count. If it becomes necessary during
9 the times of your deliberations to communicate with the
10 court, all you have to do is get the bailiff, who is right
11 at the door, and he will take a note from you to me and
12 I will answer anything that you ask me in that note.

13 The note will be sent in by the foreman. Any
14 one of you may give him the question to put down but he
15 is the one that signs it and sends it in. Give it to him.

16 If at any time during your discussions you are
17 called out here, do not reveal to the Court or anyone else
18 how the jury stands numerically or otherwise on a question
19 before you until you have reached a unanimous verdict.

20 There is one more time that I talk to the lawyers
21 before I turn you over to the marshal and if you will excuse
22 me at this time I will do that and then we will continue on.

23 (At the side bar.)

24 THE COURT: Mr. Joy.

25 MR. JOY: Yes, I have an exception, your Honor.

I wonder if it would be easier to do this outside because I think the jury is going to hear me.

THE COURT: We can do it right here.

MR. JOY: Number one, I don't believe that Bellamy is a co-defendant.

THE COURT: What?

MR. JOY: Bellamy is not a co-defendant. He's a co-conspirator not a co-defendant.

The next point is I believe in describing what reasonable doubt was you indicated that it must be a substantial doubt and I think I object to the use of the word "substantial."

THE COURT: Objection is noted.

MR. JOY: Number two, you indicated that while they couldn't get the statement that had been given that they could hear it read again which I would object as having put an undue stress on the government's proof.

THE COURT: Your objection is noted.

MR. JOY: Number three, I believe your Honor stated that the defendant may be proven guilty by direct or circumstantial evidence. Of course he could be acquitted equally by circumstantial or direct evidence. I think, again, it was loaded unfairly in favor of the--

THE COURT: You better tell these fellows that

1 write these books about it. These are all taken right out
2 of Labigh and the other.
3

4 Go ahead. I note the objection.

5 MR. JOY: Your Honor indicated that in referring
6 to prior criminal convictions that an assault would have nothing
7 to do with--

8 THE COURT: The ability to tell the truth.

9 MR. JOY: Right. I believe the evidence law
10 is that if it is a felony it is something they can take into
11 account, any felony and I think that the jury may have
12 been misled by your reference to perjury being relevant
13 and that I think whereas I believe the law is that any
14 felony is relevant and any misdemeanor that involves moral
15 turpitude or criminal falsity.

16 Again, I think when you were talking about the
17 identification, I don't think you got to the point or at
18 least I didn't hear it and if I am wrong, correct me, you
19 didn't say that the identification was one of the elements
20 that had to be proved by the government beyond a reasonable
21 doubt.

22 Six, that having mentioned the fact about the
23 pictures, I think your Honor should go on to say that
24 however if somebody thinks the person in the picture is not
25 the defendant that may create a reasonable doubt.

1
2 THE COURT: All right, I have noted it. Anything
3 else?

4 MR. JOY: No.

5 THE COURT: Mr. Shwartz?

6 MR. SHWARTZ: No exceptions, your Honor.

7 THE COURT: I am going to tell them that Bellamy
8 is a co-conspirator and not a co-defendant.

9 I decline to charge on identification because I
10 have told the jury more than once that every element of the
11 case, every material element of the case must be proven
12 by the government beyond a reasonable doubt.

13 I decline to further amplify on that. As to
14 the other requests about the felony, the fact that can be
15 considered in determining whether or not the credibility
16 of the witness is acceptable, I find that I have sufficiently
17 charged with an exception to the defendant.

18 All the exceptions are noted.

19 MR. JOY: How about the fact they don't think it
20 is the guy in the picture that may give rise to a reasonable
21 doubt.

22 THE COURT: I decline to charge that.

23 MR. SHWARTZ: It is true Mr. Bellamy is not
24 named as a defendant in this indictment. He was indicted
25 on a separate indictment for reasons that your Honor and Mr.
Joy well know and I wonder whether it would be proper to

1 infrom the jury having already heard testimony that Mr.
2 Bellamy has pled guilty, that he was indicted for this bank
3 robbery in another indictment.
4

5 THE COURT: I am just going to say in this in-
6 dictment he is named as a co-conspirator. They are aware of
7 that other aspect of it.

8 (In open court.)

9 THE COURT: It has been called to my attention
10 that I described Bellamy as a co-defendant, but actually
11 in this indictment here he is named as a co-conspirator
12 rather than a co-defendant. But the same rules of law
13 apply that I was describing to you anyhow. I misnamed him
14 in this indictment.

15 Also I want to call your attention to the fact
16 when I was talking about aiding and abetting, that only
17 applies to counts 2 and 3 and not to count 1, the con-
18 spiracy count. In order to be found guilty in a conspiracy
19 count you would have to find that there was an agreement,
20 there was an overt act committed and that he became a part
21 of the conspiracy willfully, knowingly and unlawfully.
22 Those are the three elements.

23 Mr. Marrero and Mr. Kleiner, I particularly want
24 to thank Mr. Kleiner for staying with us as long as he did.
25 I apologize for having done it this way but I thank you

anyhow for having served. You are excused at this time.
And that goes for Mr. Pierro.

(The alternate jurors were excused.)

THE COURT: Swear the marshal and, Mr. Schwartz, would you please give the jury a clean copy of the indictment. Show it to Mr. Joy first.

(Marshal sworn by the Clerk of the Court.)

(Jury departed to commence deliberating at
12:40 p.m.)

THE COURT: I imagine they will be taking them out to lunch almost shortly. You will be excused in about five minutes. Do you have any objection to the clerk giving them the exhibits when they ask for them?

MR. JOY: No objection.

MR. SHWARTZ: No objection.

I have shown this clean copy to Mr. Joy and we have agreed it is a fair and accurate copy of the indictment.

THE COURT: All right. The Clerk is being directed to give that indictment to the jury.

(Jury deliberations continued.)

2:30 p.m.

(In open court, jury present.)

THE COURT: The Court has a note from the jury. Item number 1, testimony of FBI Agent Bernard

jpjl

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1
2 regarding confession of Roland Smith. 2, all photos and
3 blowups produced in evidence."

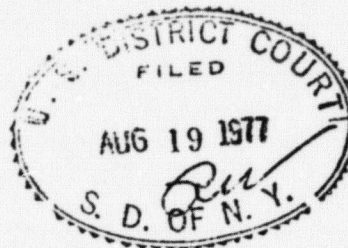
4 Number 2, you have been furnished with these
5 exhibits. The reporter is directed to read that portion of
6 the testimony of the agent requested by the jury.

7 (Record read.)

8 THE COURT: That concludes the testimony.

9 (Jury returned to the courtroom at 2:35 p.m.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
UNITED STATES OF AMERICA : MEMORANDUM
-against- : DECISION
ROLAND SMITH, : S77 Cr. 280
Defendant. :
-----X

CANNELLA, D.J.:

Motion pursuant to Fed. R. Crim. P. 41(f), seeking to suppress a statement given by the defendant to an Assistant United States Attorney, is hereby denied.

THE FACTS

On April 7, 1977 at approximately 10:15 a.m. Roland Smith was arrested by New York City Police Detectives William Carbone and James Fox at the home of his grandmother, Ida Brown. The detectives identified themselves to Smith and his grandmother and informed them that Smith was being arrested for the March 30, 1977 bank robbery of the 200 Lexington Avenue branch of the National Bank of North America. Mrs. Brown was present when Detective Carbone gave Smith the Miranda warnings, and the defendant indicated that he understood his rights. Neither Smith nor his grandmother requested the assistance of an attorney.

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After Mrs. Brown was told where Smith would be taken and was given a telephone number where Detective Carbone could be reached, Smith was escorted to the 84th Police Precinct. F.B.I. Special Agent Raymond Bernard was immediately advised of Smith's arrest and proceeded to the police station with Special Agent Vogt in order to place the defendant in federal custody. This occurred sometime between 10:30 and 10:45 a.m. As the police officers had done, Agent Bernard introduced himself and Vogt to Smith, explained to him the nature of the federal arrest and advised him of his rights. Smith again indicated his understanding and did not request an attorney.

The federal agents then took Smith directly to the Office of the United States Attorney for the Southern District of New York, arriving at approximately 11:00 a.m. The agents deviated from the usual practice of first processing the arrestee at F.B.I. Headquarters because they believed Smith to be a juvenile. During the car ride, Smith was again given the Miranda warnings, but was not questioned. At the United States Attorney's Office, Smith was interviewed by Arthur Rucks of the Pre-Trial Services Agency in order to gather information for the setting of bail. The interview lasted approximately from 11:50 a.m. until 12:15 p.m. Smith was also processed by the Marshal's Office during this time period.

13

Following the interview with Rucks, the defendant was taken to the office of Assistant United States Attorney John Flannery, to whom the case had been assigned. Before speaking with Smith, Flannery reviewed the Juvenile Delinquency Act, 18 U.S.C. § 5031 et seq., and consulted with a colleague regarding special procedures to be followed when interviewing a juvenile. He also spoke with the agents in order to familiarize himself with the facts of the case. Flannery learned that one of the bank robbers was still at large, and that the shotgun used in the robbery as well as most of the purloined money had not been recovered. Finally, Flannery contacted the Office of the Manhattan District Attorney and learned that the state authorities would decline to prosecute Smith. See 18 U.S.C. § 5032.

In addition to Smith and Flannery, Agents Carbone and Fox as well as Thomas Eich of the United States Probation Department, were present at the interview. Eich's presence had been specifically requested by Flannery because of Smith's juvenile status. Flannery began the interview by reading Smith the Miranda warnings. Smith indicated he understood his rights and was willing to answer questions. At no time did Smith request an attorney. Following the warnings, Smith made certain statements which are the subject of the instant motion to suppress. The interview, which had

begun at approximately 1:50 p.m., lasted about forty minutes. At approximately 3:00 p.m., the defendant was brought before Magistrate Jacobs, assigned counsel and arraigned. The Court finds that at no time was there any suggestion or use of coercion or duress, either direct or indirect.

On May 12, 1977, after a hearing, the Honorable Charles L. Brieant granted the Government's motion to transfer Smith to adult status.

DISCUSSION

The grounds advanced for the instant motion are twofold: firstly, that the proper Miranda warnings were not given; and secondly, that the Government failed to comply with the provisions of the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-42. Finding both arguments to be without merit, the Court declines to suppress the statements made to Assistant United States Attorney Flannery.

Miranda Warnings

It is clear from the testimony in the case that on all occasions the defendant was given the proper Miranda warnings. There is no support for defendant's assertion that in effect he was read a "seed catalog" series of questions. The federal agents, as well as the police

detectives, were meticulous in giving Smith the warnings and ascertaining that he understood his rights. See Miranda v. Arizona, 384 U.S. 436, 444 (1966). Similarly, the Assistant United States Attorney was careful to explain to Smith the Miranda rights as well as the nature of the arrest. This basis of defendant's suppression motion therefore fails.

Juvenile Delinquency Act Protections

18 U.S.C. § 5032

This section of the Juvenile Delinquency Act concerns the transfer of a juvenile to adult status for criminal prosecution and provides, in part, that "[s]tatements made by a juvenile prior to or during a transfer hearing under this section shall not be admissible at subsequent criminal prosecutions." In that the statements at issue were made prior to the transfer hearing at which Judge Brieant presided, defendant claims that § 5032 mandates their suppression.

The Court disagrees with defendant's interpretation of this provision. Although a literal reading of the above-quoted language seemingly supports this argument, such a reading makes little sense in the context of the entire section. Clearly, the last sentence of § 5032 was meant to prohibit only those statements made by a juvenile

in connection with a transfer hearing. United States v. Spruille, 544 F.2d 303 (7th Cir. 1976); United States v. Cheyenne, 420 F. Supp. 960 (D.S.D. 1976). It therefore follows that "statements made by the Defendant prior to the commencement of transfer proceedings and having no connection with those proceedings, are admissible in subsequent criminal proceedings." United States v. Cheyenne, supra at 962.

In addition to having been rejected in the only two reported cases to have dealt with the issue, defendant's construction of § 5032 conflicts with the very purposes of the Act. Under this interpretation, statements given by the older and more mature juveniles who are the subject of transfer hearings would be suppressed while, at the same time, statements of younger and more inexperienced juveniles would be freely admitted into evidence at their trials. Congress could not have intended the statute to be such an antilogy.

It is undisputed that the statements Smith made to Flannery on April 7 had no connection whatsoever with the subsequent transfer hearing before Judge Brieant. For this reason, § 5032 of the Juvenile Delinquency Act offers no valid basis for the suppression of these statements.

18 U.S.C. § 5033

This provision of the Juvenile Delinquency Act reads as follows:

Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

The juvenile shall be taken before a magistrate forthwith. In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate.

Defendant claims that the Government's conduct violated the section because the Miranda warnings were not given to him "in language comprehensive [sic] to a juvenile" and he was not "taken before a magistrate forthwith." The Court finds instead that Smith understood the rights as they were read to him and that no unreasonable delay elapsed between his arrest and arraignment.

As noted earlier, Smith was given the Miranda warnings on at least three separate occasions. Each time, he indicated an understanding of his rights to the particular Government official. It is noteworthy that Smith, who was

approximately 17-1/2 years old at the time of his arrest, was not a stranger to law enforcement procedures. He was the subject of four prior arrests, one of which culminated in a conviction. Being "street wise," he was probably familiar with the basic Miranda warnings.

Moreover, Ida Brown, who is defendant's legal guardian as well as his grandmother, was present during the initial arrest of her grandson. She witnessed Detective Carbone's explanation of the nature of the charges against Smith and his constitutional rights with respect to those charges. Detective Carbone, no doubt sensing Mrs. Brown's grave concern for her grandson, told her where the defendant would be taken and gave her a telephone number where the detective could be reached or a message left for him.

The Court finds the defendant's rights to have been fully protected. These rights could have been asserted either by Smith, who indicated his understanding of the Miranda warnings each time they were read to him, or by his grandmother, who was present during Smith's arrest. No more is required by the Constitution or the statute.

Defendant's contention that he was detained for an unreasonably long period of time prior to arraignment is not sustained by the evidence. The two cases relied upon by defendant in this regard are based on fact patterns

peculiarly distinct from the circumstances in this case. United States v. Binet, 442 F.2d 296 (2d Cir. 1971), and United States v. Glover, 372 F.2d 43 (2d Cir. 1967), both were appeals from juvenile delinquency adjudications; Roland Smith, by contrast, was prosecuted as an adult after Judge Brieant found that a transfer to adult status would be "in the interest of justice." 18 U.S.C. § 5032. Indeed, by virtue of age and severity of crime, the defendants in Binet and Glover could not have been proceeded against as adults. According to § 5032, only "a juvenile sixteen years and older alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony punishable by a maximum penalty of ten years imprisonment or more, life imprisonment, or death" may be transferred to adult status. The crimes committed by Binet and Glover^{1/} were both punishable by a maximum of five years imprisonment. Additionally, Binet was only fifteen years old at the time of his arrest. The crime for which Roland Smith was indicted was a bank robbery accomplished with the use of a shotgun. Both customers and bank employees were certainly put in fear of their lives and might conceivably have been killed. Congress, recognizing the severity of this increasingly frequent crime, has made it punishable by up to twenty-five years imprisonment.

In addition to considering the nature of the alleged offense, other factors had to be weighed by Judge Brieant before he could grant the Government's motion to transfer Smith to adult status. These factors include the juvenile's background and maturity as well as his prior delinquency record. See 18 U.S.C. § 5032.

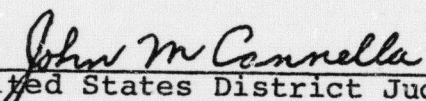
The above discussion makes clear that juveniles transferred to adult status are in a separate category from those prosecuted in juvenile delinquency proceedings, thus distinguishing Binet and Glover from the case presently before this Court. Although Smith, because of his age, enjoys the protections afforded by the Juvenile Delinquency Act, a determination of what constitutes such protection can be made only after examining the facts of each case. That Congress provided for, and Judge Brieant effectuated, Smith's transfer to adult status indicates that a youth in his position does not need the depth of protection extended to Binet and Glover.

Further factual distinctions also may be drawn between Roland Smith, on the one hand, and Binet and Glover, on the other. Whereas one-half of the eight-hour delay between Binet's arrest and arraignment was completely unexplained, and more than sixteen hours elapsed between Glover's arrest and arraignment, the five-hour delay before Smith was

brought before a magistrate was shown to have been reasonable under the circumstances. The Government produced ample documentation of the events that occurred during this time period. Even the forty-minute interview with Assistant United States Attorney Flannery, during which the statements in question were given, was necessary both for bail purposes and to aid in the apprehension of the fourth bank robber. Compare Binet, supra, 442 F.2d at 299.^{2/}

In sum, the Court finds that Roland Smith was not detained for a longer period than was necessary. The defendant's rights, as guaranteed by § 5033 of the Juvenile Delinquency Act, were in all respects observed. This final basis for suppression of the statements given to Flannery having failed,^{3/} defendant's motion is denied and the statements are admissible into evidence.

SO ORDERED.


United States District Judge
JOHN M. CANNELLA

Dated: New York, N.Y.
August 19, 1977.

FOOTNOTES

1/

The basis of Binet's adjudication was possession of stolen mail; Glover was accused of having passed a forged money order.

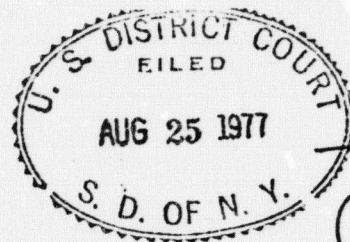
2/

In this regard the facts contrast sharply with those present in Binet. The Second Circuit therein commented on the needlessness of questioning Binet "for the participants in the crime were caught while perpetrating it." Binet, supra, 442 F.2d at 299.

3/

The Court rejects defendant's claim that pre-arraignment questioning of an indigent juvenile by the United States Attorney violates Disciplinary Rule 7-104(A)(1) of the ABA Code of Professional Responsibility.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X

UNITED STATES OF AMERICA,

:

-against-

:

ROLAND SMITH,

:

Defendant.

:

-----X

E R R A T U M

S-77 Cr. 280

Re: Memorandum and Decision dated August 19,
1977 in the above entitled matter, the first two lines
of the second paragraph on page 3 should read as follows:

In addition to Smith and Flannery,
Agents Bernard and Vogt as well as Thomas
Eich, etc.

SO ORDERED.

John M. Cannella
JOHN M. CANNELLA
United States District Judge

Dated: New York, N.Y.
August 25, 1977.

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AUG 20 1977

